INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Specification of Errors to be Urged	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix A — Statutes	11

CITATIONS

Cases:	
Santa Cruz Fruit Packing Co. v. NLRB (1938), 303 U.S. 453; 82 L.E. 954	4
NLRB v. Jones & Laughlin Steel Corp. (1937), 301 U.S. 1; 81 L.E. 893	5
10 East 40th Street Building v. Callus (1945), 325 U.S. 578; 89 L.E. 1806	5
Midland Building Co. (1948), 78 NLRB 1243	7
Central Tower, Inc. (1949), 84 NLRB 357	8
Corrigan Properties, Inc. (1949), 87 NLRB 252	8
Cormqx, Inc. (1951), 94 NLRB 1150; 28 LRRM 1145	8
Hotel Association of St. Louis (1951), 92 NLRB 1388	9
Checker Taxi Co. (1953), 107 NLRB No. 85	9
NLRB v. Guy F. Atkinson Co. (CA 9; 1952), 195 F. (2d) 141	10
Statutes:	
5 USC Section 1009(e)	12
29 USC Section 152(6)	11
29 USC Section 152(7)	11
29 USC Section 160(a)	11

In The

United States Supreme Court

October Term, 1953

No.———

———

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 26, 1954.

OPINIONS BELOW

The Intermediate Report of the Trial Examiner of the National Labor Relations Board (BA-10a)* is unreported. The Decision and Order of the National Labor Relations

* References to portions of record reprinted in Petitioner's (The Dixie Terminal Company) appendix are designated "PA"; references to portions of record reprinted in The National Labor Relations Board's appendix are designated "BA".

Board (BA-8a) is reported in 102 NLRB No. 156. The opinion of the Court of Appeals is reported in 210 F. (2d) 538.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1954. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board has jurisdiction over the owner and employees of a general office building.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, supra, pp. 11-12.

STATEMENT

On January 16, 1952, a charge was filed with the National Labor Relations Board by Building Service Employees International Union, Local No. 158-A, Building Service Employees International Union, AFL, against The Dixie Terminal Company, Petitioner. (BA-3a) On May 5, 1952, a complaint was issued against Petitioner by the General Counsel of the National Labor Relations Board, alleging that Petitioner, an Ohio corporation which owns and operates an office building in Cincinnati, Ohio, called The Dixie Terminal Building, had engaged in and was engaging in certain unfair labor practices affecting commerce as defined in the Labor Management Relations Act, 1947 (hereinafter called the Act), and that Petitioner was engaged in commerce within the meaning of the Act. (BA-4a)

On May 28, 1952, Petitioner filed an answer denying the above allegations of the complaint. (BA-7a) After hearings, the National Labor Relations Board's Trial Examiner, on October 27, 1952, issued his Intermediate Report, finding that Petitioner was engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Petitioner had engaged in certain unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act. (BA-10a) On October 28, 1952, the case was transferred to the National Labor Relations Board (BA-3a) On November 11, 1952, Petitioner filed exceptions to the Intermediate Report, denying the above findings of the Trial Examiner. (PA-3a) On February 18, 1953, the National Labor Relations Board issued its decision and order, affirming and adopting the findings, conclusions and recommendations of the Trial Examiner. (BA-8a)

On petition for enforcement, the Court below amended the Board's order, and decreed enforcement of the order as amended. (PA-142a) The Court specifically found that the work of Petitioner's elevator and service employees, although local in nature, had such a relationship to the interstate business of the tenants as to affect commerce within the meaning of the Act, and that Petitioner, therefore, was subject to the Act. (PA-142a)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the work of Petitioner's elevator and service employees, although local in nature, had such a relationship to the interstate business of the tenants as to affect commerce within the meaning of the Labor Management Relations Act, 1947.

2. In holding that a labor dispute involving such employees would tend to burden or obstruct the free flow of

commerce of the tenants of Petitioner within the meaning of the Labor Management Relations Act, 1947.

3. In holding that operation of a general office building affects commerce within the meaning of the Labor Managements Relations Act, 1947, and that Petitioner, therefore, was subject to the jurisdiction of the National Labor Relations Board.

4. In enforcing, as amended, the order of the National Labor Relations Board.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, in the instant case, is in conflict with decisions of the Supreme Court of the United States, which establish that the activities of a local business do not "affect commerce" within the meaning of the Labor Management Relations Act, 1947. (Title 29 USC Sec. 152[7]), when such activities do not in fact, bear a "close, substantial relationship to interstate commerce." In *Santa Cruz Fruit Packing Co.* v. *NLRB* (1938) 303 U.S. 453; 82 L.E. 954, this Court said, at page 466:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relationship to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. (Citing cases) 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' "

The Court also said, at page 467:

> "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined."

The Court said that a "gradual process of inclusion and exclusion" must be followed in determining whether or not a particular activity "affects commerce" within the meaning of the Act. Earlier, in *NLRB* v. *Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1; 81 L.E. 893, the Court likewise said, at page 37:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

This Court has not yet determined whether the operation of a general office building affects commerce to such a degree that the activity is subject to the jurisdiction of the Labor Management Relations Act, 1947. The Court has determined, however, that the operation of such a building is sufficiently local to be outside the jurisdiction of the Fair Labor Standards Act, Title 29 USC Sections 206, 207. In *10 East 40th Street Building* v. *Callus* (1945) 325 U.S. 578; 89 L.E. 1806, the Supreme Court held that maintenance employees of a general office building, such as the Dixie Terminal Building, were not subject to the jurisdiction of the Fair Labor Standards Act. In its opinion, the Court stated at page 583:

"Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

The Court also said that:

" * * * remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the Federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attentuated for appropriate regard to the regulatory power of the State which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and Federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

"The differences between employees of a building owned by occupants producing therein goods for commerce, and the employees of a building intended for tenants who produce such goods therein, and the employees of the office building of a large interstate producer, are too thin for the practicalities of adjudication. But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a

manufacturing building or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts." (Pages 583-584)

The court further said, at page 584:

"It is a distinction appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act. Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us. But for drawing the figurative line the basis must be something practically relevant to the problem in hand. We believe that is true of the line drawn in this case."

Following the decision of this Court in *10 East 40th Street Building* case above, the Labor Board stopped exercising jurisdiction over general office buildings. In a footnote to its decision in *Midland Building Co.* (1948) 78 NLRB 1243, the Board said:

"Cf. *10 East 40th Street Building* v. *Callus,* 325 U.S. 578. Although our jurisdiction is broader than that under the Fair Labor Standards Act, and this decision is not decisive as to our legal jurisdiction in this situation, the characterization of such an enterprise by the Supreme Court as essentially local is of persuasive significance in a policy determination in connection with the assertion of jurisdiction."

The Midland Building involved in the above decision was a general office building located in Kansas City, Mis-

souri. Fifteen different railroad companies occupied 21.21% of the space. Among the larger tenants were the Western Union Company, Acme Freight Company, and various construction and manufacturing firms. In declining jurisdiction, the Board said:

> "The Employer's operation of a general office building is essentially local in character. While many of the Employer's tenants are clearly engaged in interstate commerce the activities of these tenants, insofar as the Employer's building is concerned, are predominantly clerical and constitute a relatively small and unimportant part of their interstate operations. The services rendered by the Employer's building maintenance employees are still more remote from the tenant's interstate operations. It seems unlikely that a stoppage or curtailment of the Employer's services and facilities would have more than a negligible effect on interstate commerce. Therefore, we are of the opinion that it would not effectuate the policies of the Act to assert jurisdiction in this case. Accordingly, we shall dismiss the petition."

Similarly in *Central Tower, Inc.* (1949) 84 NLRB 357, the Board declined jurisdiction over a general office building in Youngstown, Ohio, with 53,000 square feet of rentable space and 100 tenants, many of whom were engaged in Interstate Commerce. The Board said:

> "Without deciding whether the Respondent's operations affect commerce within the meaning of the Act, we find that it will not effectuate the policies of the Act to assert jurisdiction in this case."

Accord: *Corrigan Properties, Inc.* (1949) 87 NLRB 252.

Subsequently, in *Cormqx, Inc.* (1951) 94 NLRB 1150; 28 LRRM 1145, the Board apparently decided to try to

broaden its jurisdiction, and in a footnote, overruled the above cases. The decision was not appealed, and today the law remains uncertain on this important question.

It is submitted that the problem is not simply one of exercise of jurisdiction by the Board, but is one concerning the construction of the phrase "unfair labor practice affecting commerce" as used in Section 10 (a) of the Act, and is a problem of law for decision by this Court. Almost every urban community in the United States contains one or more general office buildings. The ownership and operation of such a building is a typical American local enterprise. In view of the vacillations of the Labor Board with respect to jurisdiction over such property, it is of great importance to have this question resolved by this Court, just as the equally important question of exemption of such property from the operation of the Fair Labor Standards Act was authoritatively resolved by this Court in *10 East 40th Street Building* case, *supra.*

2. Even if this Court should decide that the operation of such a buliding "affects commerce" within the meaning of the Act, the decision of the Court of Appeals should be reversed because the Board has exercised its jurisdiction in an arbitrary, capricious and discriminatory manner and has thus denied the Petitioner the equal protection of the law.

In *Hotel Association of St. Louis* (1951) 92 NLRB 1388, the National Labor Relations Board held that the operation of a commercial hotel is a "local business" and that the Board will not assert jurisdiction over such a hotel or its employees. Similarly, in *Checker Taxi Co.* (1953) 107 NLRB No. 85, the Board declined jurisdiction over a taxi cab company and its employees even though 20% of the business of the taxi cab company resulted from trips to and from railway stations in interstate commerce. Section 1009 (e) of the Administrative Procedure Act, Title 5 USC Section 1009 (e) requires the reviewing court to

set aside agency action when it is found to be "arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law." In *NLRB* v. *Guy F. Atkinson Co.* (CA 9; 1952) 195 F. (2d) 141, an order of the NLRB was set aside when it was found that the Board had first refused to exercise jurisdiction over the building trades industry and had then changed its policy and decided to exercise jurisdiction, as a result of which innocent persons sustained injury.

It is respectfully submitted that it is equally unfair and prejudicial to the Petitioner for the Labor Board to decline jurisdiction over elevator operators in large commercial hotels, and over taxi cab drivers transporting the traveling public to railroad stations for interstate travel, and to assert jurisdiction over the owners of commercial office buildings who are obviously much further removed from the flow of interstate commerce.

CONCLUSION

This petition presents a question which involves thousands of office building throughout America. Without a clear cut decision by this Court, the same question will arise in every case in which the Board attempts to exercise jurisdiction over employees of a general office building. It is respectfully submitted that the Petitioner is entitled to the protection of this Court against the vacillations and caprices of the National Labor Relations Board in exercising jurisdiction over real estate of this type. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

JOHN B. HOLLISTER,
Attorney for Petitioner.

May 18, 1954

APPENDIX A

29 USC Section 152(6).

The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territoy or the District of Columbia or any foreign country.

29 USC Section 152(7).

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

29 USC Section 160(a).

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

5 USC Section 1009

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * *

(e)

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings and conclusions with respect to petitioner's operations	3
B. The decision of the court below	5
Argument	6
Conclusion	10

CITATIONS

Cases:

Central Tower, Inc., 84 NLRB 357	7
Cormax, Inc., 94 NLRB 1150	8
Corrigan Properties, Inc., 87 NLRB 252	7
International Brotherhood of Electrical Workers v. *National Labor Relations Board*, 181 F. 2d 34, affirmed, 341 U.S. 694	6, 9
Local 74, United Brotherhood of Carpenters & Joiners v. *National Labor Relations Board*, 341 U.S. 707	6
Midland Building Co., 78 NLRB 1243	7
National Labor Relations Board v. *Guy F. Atkinson Co.*, 195 F. 2d 141	8
National Labor Relations Board v. *Baltimore Transit Co.*, 140 F. 2d 51, certiorari denied, 321 U.S. 795	9
National Labor Relations Board v. *Denver Bldg. Trades Council*, 341 U.S. 675	6, 9
National Labor Relations Board v. *Fainblatt*, 306 U.S. 601	6
National Labor Relations Board v. *Gulf Public Service Co.*, 116 F. 2d 852	9
National Labor Relations Board v. *Mid-Co Gasoline Co.*, 183 F. 2d 451	9

Cases—Continued

	Page
National Labor Relations Board v. *Pierce Bros.*, 206 F. 2d 569, certiorari denied, 347 U.S. 915....	9
National Labor Relations Board v. *Townsend*, 185 F. 2d 378, certiorari denied, 341 U.S. 909.....	9
Polish National Alliance v. *National Labor Relations Board*, 322 U.S. 643.....	6
10 East 40th St. Co. v. *Callus*, 325 U.S. 578.....	7, 8
United States v. *Morton Salt Co.*, 338 U.S. 632. ..	9

Statute:

National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*).....	2

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 770

THE DIXIE TERMINAL COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. II. 142a-146a) [1] is reported at 210 F. 2d 538. The findings

[1] Reference to the Transcript of Record which is in two volumes consisting of the appendices of the Board and the Company filed in the court below will be identified by the symbols "R.I." and "R.II.," respectively. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

of fact, conclusions of law and order of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner (R.I. 8a-75a), are reported at 102 NLRB 1452.

JURISDICTION

The judgment of the court of appeals (R.II. 142a) was entered on February 26, 1954. The petition for a writ of certiorari was filed on May 19, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board properly asserted jurisdiction over petitioner in its operation of an office and terminal building, a large proportion of which is occupied by tenants directly engaged in interstate commerce.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth at pp. 11-12 of the petition.

STATEMENT

Following the usual proceedings pursuant to Section 10 of the Act, the Board found that petitioner's operations affected commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction (R.I. 8a, n. 2, 32a-33a). The Board found further that petitioner had by certain conduct violated Section

8 (a) (1) and (3) of the Act, and issued an appropriate remedial order (R.I. 8a-10a). On petition for enforcement, the court below held that the Board's assertion of jurisdiction was proper and enforced the Board's order with a modification not relevant here (R.II. 144a-146a). The single question raised by the petition relates to the propriety of the Board's assertion of jurisdiction.

A. The Board's findings and conclusions with respect to petitioner's operations

Petitioner, an Ohio corporation, owns and operates the Dixie Terminal Building in Cincinnati, Ohio, where it leases office space and terminal facilities to numerous business enterprises, a substantial portion of which are engaged in interstate commerce (R.I. 12a, 15a; 4a, 7a, 80a-81a). The Dixie Terminal Building consists of two sections, a north building and a south building, which are operated as a single entity and are under the same supervision and management (R.I. 15a; 80a, 230a, 251a).

The north building is a ten-story structure with a concourse and sub-basement (R.I. 15a; 195a). It is occupied by 126 tenants representing a cross-section of American industrial life (R.I. 15a, 69a-73a; 80a-81a). Among these tenants are more than a score of interstate railroads, which in the aggregate in 1951 did freight and passenger business at their Dixie Terminal offices running into many thousands of carloads and several millions of dollars (R.I. 15a, 69a-73a, 22a-24a; 84a-108a, 180a-182a). In addition, petitioner leases office space in

its north building to a variety of enterprises, which at these offices deal with goods moving interstate and provide interstate services ranging in value from $25,000 to $4,000,000 (R.I. 15a, 69a-73a, 24a-25a, 28a, 74a-75a; 76a, 81a-83a, 109a-111a, 112a-118a, 120a-150a, 152a-162a, 164a-170a, 175a-177a, 182a-183a, 220a-229a). These enterprises include branch offices of multistate insurance companies, investment companies, shipping concerns, and other agents and brokers whose activities directly involve interstate operations (R.I. 15a; 80a, and references immediately preceding).

In sum, it appears that over 40 percent of the tenants, occupying at least 30 percent of the space in petitioner's north building, are enterprises handling interstate goods or performing interstate services.

Virtually all of the space (99.53 percent) in the south building, which is smaller than and adjoins the north building, is occupied by the Cincinnati, Newport and Covington Railway, which uses the south building as a terminal for its interstate bus operations, and by the Western Union Telegraph Company, which, in addition to handling the normal flow of messages, maintains there a relay station and a plant and engineering department servicing several states (R.I. 15a, 73a, 25a-26a, 170a-174a). In 1951, some 10 million interstate bus passengers used the south building terminal facilities; in the same year the value of the business done by Western Union at the Dixie Terminal Building

amounted to over 1½ million dollars (R.I. 26a, 27a; 174a, 172a).

In return for furnishing office space and concomitant services—including elevator operators and service employees who are involved in this proceeding—to its numerous tenants engaged in interstate commerce, petitioner received from the tenants approximately $200,000 a year. Thus, petitioner was paid over $80,000 a year by interstate railroads; over $42,000 a year by Western Union; almost $16,000 a year by Cincinnati, Newport and Covington Railway for its bus operations; and over $50,000 a year by the other interstate enterprises (R.I. 28a, 69a-73a, 74a-75a; 80a-81a).

Upon these facts, the Board found that petitioner's operations affected commerce within the meaning of the Act and that it would effectuate the purposes of the Act for the Board to assert jurisdiction over petitioner (R.I. 8a, n. 2, 32a-33).

B. The decision of the court below

The court below enforced the Board's order with a modification not relevant here (R. II. 142a-146a). On the issue of jurisdiction, the court concluded that the work of petitioner's "employees, although local in nature, had such a relationship to the interstate business of the tenants as to affect commerce"; that "[a] labor dispute involving such employees would tend to burden or obstruct the free flow of commerce of the tenants therein"; and that, accordingly, there was ample warrant for the

Board's assertion of its statutory power in the instant case (R.II. 144a-145a). The court also stated that the Board's refusal to assert its statutory power in cases involving commercial hotels and in certain taxicab cases could not be regarded as rulings that the Board was without jurisdiction over such enterprises as petitioner's and that failure to exercise jurisdiction would not, in any event, extinguish jurisdiction (R. II. 145a-146a).

ARGUMENT

1. Petitioner's challenge (Pet. 4-9) of the Board's jurisdiction in the instant case presents no question warranting review by this Court. As the decisions of this Court conclusively establish, Congress in the Act "has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce", and "left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675, 683-684; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606-607; *Local 74, United Brotherhood of Carpenters & Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 712; *International Brotherhood of Electrical Workers*

v. *National Labor Relations Board,* 341 U. S. 694, 699. It is undisputed that petitioner in its Terminal Building housed numerous tenants engaged in extensive and far-flung interstate activities and that in addition to "the usual operations incident to leased office space," part of the building was used by tenants for "their actual physical interstate operations" (R.II. 145a). Manifestly, a cessation of the services furnished by petitioner to its tenants by reason of industrial strife attributable to unfair labor practices would necessarily tend to have a substantially adverse impact upon the interstate activities of those tenants. In these circumstances, petitioner's operations, as the court below properly concluded (R.II. 144a-145a), clearly fall within the coverage of the Act.

Petitioner is mistaken in its reliance upon *10 East 40th St. Building* v. *Callus,* 325 U. S. 578, in which this Court held that the operation of a general office building was outside the scope of the Fair Labor Standards Act, and upon three Board decisions issued thereafter (*Midland Building Co.,* 78 NLRB 1243; *Central Tower, Inc.,* 84 NLRB 357; *Corrigan Properties, Inc.,* 87 NLRB 252) in which the Board without passing on its jurisdictional power declined to assert jurisdiction over general office buildings. As the opinion of the court below demonstrates, (R.II. 145a), not only is the instant case distinguishable from the *Callus* case on its facts, but, more important, the jurisdictional scope and terminology of the Fair Labor

Standards Act are considerably narrower than that of the National Labor Relations Act. Indeed, this Court specifically noted in the *Callus* case that in enacting the Fair Labor Standards Act "Congress did not see fit, as it did in other regulatory measures, *e.g.*, the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce" (325 U. S. at 579). The cited Board decisions involved nothing more than a discretionary determination not to assert the Board's statutory power over the particular enterprises. Moreover, as petitioner concedes (Pet. 8-9), those cases were expressly overruled by the Board in *Cormax, Inc.*, 94 NLRB 1150, a case not unlike this one, upon which the Board relied in the instant case, and which was decided June 7, 1951, months prior to the onset of union activities in petitioner's plant.

2. Equally unsubstantial as a basis for certiorari is petitioner's further claim (Pet. 9-10) that the Board acted arbitrarily in asserting jurisdiction in the instant case. As already noted, the Board had as a matter of public record in the *Cormax* case, long prior to the events here involved, reversed its earlier policy of declining to assert jurisdiction over office buildings, so that petitioner cannot claim to have been misled. Cf. *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (C.A. 9). Moreover, as the court below recognized (R. II. 145a-146a), the Board's refusal to assert jurisdiction in particular cases in no way de-

prives it of the power to assert jurisdiction in other cases so long as such jurisdiction exists. Failure to assert jurisdiction does not extinguish it. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647-648; *National Labor Relations Board* v. *Pierce Bros.*, 206 F. 2d 569, 571 (C.A. 9), certiorari denied, 347 U. S. 915; *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54-55 (C.A. 4), certiorari denied, 321 U. S. 795. Finally, uniform authority establishes that the question whether the policies of the Act will be effectuated by an assertion of jurisdiction is committed to the discretion of the Board. See, *e.g.*, *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 684; *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U. S. 909. "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *Townsend, supra*, at 383. See, also, *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C.A.2), affirmed, 341 U. S. 694; *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5).

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JUNE 1954.

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